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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY CHARLES PORTER, Defendant and Appellant.	B160769 (Los Angeles County Super. Ct. No. GA045578)
In re ANTHONY CHARLES PORTER on Habeas Corpus.	B163880

APPEAL from a judgment of the Superior Court of Los Angeles County, Lillian Stevens, Judge. Affirmed as modified. The habeas corpus petition is denied.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec, Supervising Deputy Attorney General, and Lawrence M. Daniels, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant, Anthony Charles Porter, appeals the judgment entered following his conviction, by jury trial, for robbery, false imprisonment by violence, possession of a firearm by a felon, possession of a firearm by a probationer, and possession of a firearm with the identification numbers removed, with firearm use enhancements (Pen. Code, §§ 211, 236, 12021, subd. (a)(1) & (d), 12094, subd. (a), 12022.5, 12022.53).[1] Sentenced to a state prison term of 18 years, 4 months, he contends there was trial and sentencing error. In an accompanying habeas corpus petition, he contends he was denied the effective assistance of counsel.

The judgment is affirmed as modified. The habeas corpus petition is denied.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Prosecution evidence.*

On March 14, 2001, Romero R. was working as a bartender at the Acapulco Restaurant. As he was returning from taking the garbage out the back door, he was accosted by a man who grabbed him by the arm and put a hand over his throat. The man pulled out a gun and held it to Romero's head. The gunman had on black shoes, black nylon sweatpants, and a nylon jacket. A second man, wearing white shoes and armed with a knife, entered the restaurant behind the gunman. The gunman was taller and slimmer than the man with the knife, who was shorter and stockier. Both men were wearing masks or caps, and gloves. The restaurant's assistant manager was in his office when he heard a scream. He saw someone come in and put a gun to Romero's head. The manager closed his door and called 911. He told the operator two men were robbing the bartender at the Acapulco Restaurant.

Romero testified the gunman "was pointing the gun and telling me to be quiet and asking how many people were in the restaurant, who I was, what did I do, was I the manager, if I had the keys, where the office was, and asked again who else was in there.

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[1] All further statutory references are to the Penal Code unless otherwise specified.

And I told him only two of us, the manager and myself. [¶] He said was I the manager. [¶] I said, 'No, I am the bartender.' [¶] He said, 'Don't lie to me or I'm going to shoot you.' "

The gunman ordered Romero to try to get the manager to open his door. Romero knocked, but the manager would not open the door. Then the gunman told Romero, " 'This is not a game. I am not playing. Go back there and get him to open the door.' [¶] I was knocking on the door and trying to pull on the knob. It was locked; so I couldn't get it open. [¶] Two or three times he called me back and pointed the gun. 'I am not playing. Tell him to open the door.' [¶] He was getting mad; so I didn't know what to do. At one point all I could do, I gave him [the $180 or $190] I had in my pockets.[2] 'This is what I have got. I cannot open the door. He's not opening the door.' [¶] So he took the money and told me to get him to open the door. It's not a game. I'm going to shoot you. [¶] I tried again, and he didn't open the door. [¶] Then we went back to the storage room; they took me back there, and he told me, 'Get on your knees.' I got on my knees, and he put the gun to my forehead, and he says, 'If you move, I'm going to kill you. If I find any keys on you, I'm going to kill you.' " The gunman again ordered Romero to get the manager to open the door. Romero tried again, unsuccessfully. "[F]inally they took me across the kitchen to the big frig and told me to go in there, and I went in there and felt the door close right behind me." Romero remained inside the walk-in refrigerator until he was freed by police.

When the two robbers came out the back door of the restaurant, the police were waiting. The robbers ran back inside and then came running out the front door. An officer chased one of the robbers, Deandre Halliburton, who reached into his waistband and threw some things on the ground. Halliburton was caught and the police recovered the items he had discarded, including two black beanie caps and a pair of black gloves. Halliburton was wearing multiple layers of clothing; he had a pair of shorts on

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2 Romero testified he offered the gunman the $180 or $190 he had in his pockets, that this money "was my tips[,]" and that it consisted of "maybe four or five or six twenties, some ones, and a couple of fives, maybe."

underneath his pants and three shirts on underneath his sweatshirt. In one of his socks, he had $25.

Officer Anthony Ventura testified he and his partner, Steve Martinez, had responded to the robbery call in their patrol car and taken up a position where they could see the front of the Acapulco Restaurant. Ventura saw a man, subsequently identified as defendant Porter, come running out the front door of the restaurant, go across Alosta Avenue, and then "climb over the south fence of the Azusa Pacific University baseball diamond."

Ventura chased Porter on foot: "Because there was no way I was going to make it over the fence, I paralleled [Porter] along the east side of the baseball diamond and had constant observation on him." Ventura saw Porter land in centerfield and run toward second base. When he got near the infield, Porter threw some black gloves on the ground. Porter then jumped over another fence and fell down in front of some college students. Ventura "watched him get up and continue to run. There was a group of students there. He continued to run past them and [went] . . . behind a dormitory building located north of the baseball diamond."

While referring to a photograph of the scene, Ventura testified he watched as Porter "went over the small chain-link fence, fell down, got up and ran behind this building here into this foliage." The college students pointed out where Porter was hiding in some bushes. When Ventura arrived, Martinez and Officer Barrett were already there. Ventura testified Porter was "in [his] view the entire time" he was chasing him, up until Porter ducked behind the dormitory after he encountered the students.

David K. testified he had been walking across the campus with two fellow students when Porter suddenly appeared.

"A. We were walking between the dorms and the baseball field, and somebody jumped over the fence and fell down two or three feet in front of us.

"Q. What happened next?

"A. He said, 'Don't tell anybody where I am,' and took off running again.

"Q. What happened next?

"A. We kind of looked at each other and saw some police cars on the street going by with sirens and an officer running down. He was a ways away; so we looked at each other and figured something was going on so [we] headed in the direction of the guy who hopped the fence, went about 15 or 20 seconds, I guess, and when we turned the corner, the officers caught up with us and said, 'Did you see someone run by here?' [¶] We said that we had. We could see where he was hiding in the bushes. We had a direct line from where we were standing where we had walked up the street." David identified Porter as the person who had climbed over the fence and hid in the bushes. He testified Porter was wearing "a black or dark windbreaker or jacket" when he came over the fence, but that after he came out of the bushes he was only wearing a T-shirt.

Josh, one of David's companions, testified "someone jumped over the five-foot fence to the right of us, kind of stumbled to the ground right in front of us, . . . and seemed a little bit dazed, and he said, 'Don't tell them where I am at.' . . . He got up, stood up where he was and started walking away from us . . . , and as he went, we started walking after him because we didn't know what was going on, and that statement made us cautious as to what he was doing; so we started walking -- we saw officers on foot coming from the south and saw him go around the corner of the dorm, and when the cops came, we just pointed him out to the cops."

When Josh walked to the corner of the dormitory building and "looked down the side of the building," he "saw [Porter] kneeling between the building and some bushes." "About a millisecond after I got there, I saw a couple of . . . police officers in cars coming around the corner to the north of us, going quite fast. They stopped a couple of feet from where I was, and as he got out of his car, it was the K-9 officer. He got out, and I pointed, said, 'He's right there.' And he got his K-9 out and a couple of other police officers got there, and then they apprehended him at that time. [¶] Q. The person they apprehended, do you see him in the courtroom? [¶] A. Yes, it's the defendant." Josh agreed with David that when they first saw Porter he had been wearing a jacket.

Glendora Police Officer Marty Barrett was patrolling in a K-9 unit that night and monitoring the Azusa police department's radio. He parked near the Acapulco

Restaurant, heard that the suspects had come out the back door, run back in, and then come running out the front door. Barrett saw a suspect "run . . . northbound across Alosta towards the Azusa Pacific University" campus, and "an officer in foot pursuit of the suspect." Barrett drove onto the campus to cut off a potential escape route. "As I was driving down one of the roads on the campus, there were some students who stopped me and pointed to the area, said that the suspect who ran across the campus was hiding in the bushes." "And when the students pointed out to where the man was, did you . . . look in that area? [¶] A. Yes. [¶] Q. How long did it take before you were able to spot this man? [¶] A. Five, ten seconds. [¶] Q. What was he doing? [¶] A. He was hiding behind some bushes." Ventura and Martinez arrived, and the three officers took Porter into custody. Porter was "sweating profusely and breathing hard."

In and around the bushes where Porter had been hiding, police found a dark windbreaker, a set of car keys, and a pair of black sweat pants with $171 in the pocket. The gloves Ventura had seen Porter discard were found on the baseball field.

After Romero was freed from the refrigerator, he was taken to see if he could identify the suspects. He identified Halliburton as the robber with the knife, and Porter as the robber with the gun. Romero testified he identified Porter as the robber with the gun because he was wearing black shoes and had "[p]retty much the same . . . height and body build." An officer testified that when Romero saw Porter he said, "Yeah, that's the guy with the gun. Yeah. He's got the black shoes."

A knife was found just inside the back door of the restaurant. It matched Romero's description of the knife Halliburton used during the robbery. The car keys found in the bushes where Porter had been hiding belonged to a Ford Explorer which was parked in an apartment complex garage adjacent to the Acapulco Restaurant. In the back of the Explorer, police found a pair of red Nike shoes, a cap with the letter "A" on it, a police scanner, and a couple of jackets. On the night after the robbery, a worker sweeping up at the Acapulco Restaurant found a gun. Romero testified this gun looked like the one used during the robbery. The gun's identification number had been removed.

The morning after the robbery, Porter and Halliburton were left alone in a police car with a tape recorder running. During a whispered conversation, Porter says, "I just met you up in there." One of them says, "I don't even think there was anyone in there cuz I heard him say you . . . Bartender . . . . He was the only one Blood." One of them says, "They were like everywhere weren't they blood?", and the other replies, "I saw you take off, I went the other way blood." One of them remarks, "They got a tape recorder," and later one says, "Yeah, bitch ass mother fuckers play this in court."

Pasadena Police Officer Dana Orent testified as a gang expert. He said the Pasadena Denver Lanes (PDL) was a Bloods gang whose main rival was the Altadena Black Crips. PDL is "the largest gang we have in Pasadena/Altadena. They outnumber the Crips about three to one. And they are responsible probably for about three-quarters of the crime committed in the Pasadena/Altadena area as it relates to gang crime." Orent estimated that "on the streets at any one time" there "could be anywhere from 100 to 150" PDL members. Over the last nine years, there had been about 45 murders involving PDL members. Orent testified specifically about four murders, six attempted murders, and three armed robberies that PDL members had committed in recent years.

Orent testified Halliburton and Porter were active PDL gang members. Halliburton's gang moniker was Youngster, and Porter's moniker was Little Ant Dog. They both had gang tattoos. During the summer of 1999, Orent had a long discussion with Porter about his problems with rival gang members. Porter had been shot that year by a Crip during a gang feud. Orent opined the robbery in this case had been committed for the benefit of PDL. "Part of gang banging is committing robberies. It benefits the gang in several ways. First of [all], gang members obtain cash. . . . [D]oing a crime like robbery . . . allows you to obtain a large amount of cash in a short period of time. And it just allows you to continue to stay on the street, continue to live your life illegally and continue gang banging." "Just by the crime being a violent act, it's . . . intimidating to the victims and allows the gang to continue manifesting itself because it continues that cycle of gang activity."

Orent opined the robbery of the Acapulco Restaurant had been well-planned, as evidenced by the perpetrators having worn gloves and masks with cut out eye-holes, and there being a police scanner and extra clothing in the getaway car. Orent was asked: "Q. What is the significance, if any, of two Pasadena Denver Lane Bloods committing this crime together in the gang context? [¶] A. Well, you're going to go into battle, you want to go into battle with someone that you trust, someone that you know. . . . If you're going to go into an act such as . . . armed robbery, a take over robbery like this, you want to go into it with someone you know who can execute the plan just like you know you can execute the plan."

The red coat and shoes found in the Ford Explorer were connected to Porter's membership in PDL because red is the color associated with Blood gangs. The "A" on the hat could stand for "Anthony," Porter's first name, or "Little Ant Dog," his gang name. When Blood gang members meet, they often "acknowledge each other by saying, 'Blood,' acknowledge each other as 'What's up, Blood, how you doing Blood?' "

2. *Defense evidence.*

Porter denied being the person who robbed Romero. He acknowledged knowing Halliburton, but testified he never spent time with him. Porter testified that, on the night of the robbery, he went to visit his girlfriend, who lived in an apartment complex next to the Acapulco Restaurant. Porter drove to this girlfriend's apartment in a Ford Explorer which belonged to another girlfriend of his. At one point, Porter went out to a liquor store to buy a cigar.

As he was walking back, he noticed some police cars. Porter did not trust the police because in the past he had been accused of crimes he didn't commit. He went to look for a pay phone so he could have his girlfriend meet him outside or pick him up in her car. He walked onto the university grounds and asked a campus police officer where he could find a pay phone. Following the officer's directions, Porter began walking across the baseball field. When he got to the middle of the field, he saw "someone run across Alosta and scale the fence to the south of the baseball field." He saw "officers chasing that person. And there was all sorts of yelling, freeze, get down, dogs,

sirens. . . . I was in the middle of a pursuit, but I didn't know to either freeze or run or what. I didn't know what to do."

Porter testified he "panicked," "turned around and ran northbound toward the dormitory buildings." He hopped the north fence of the baseball field, but his pants got snagged and he stumbled in front of the college students. He told them, "I'm not the one they're chasing." The two students were mistaken when they testified Porter had said, "[D]on't tell them where I am[.]" "I didn't tell them don't tell them where I am. I told them they're not chasing me. They're chasing the other guy." Porter testified that, after speaking to the students, "I stopped running and I started walking. I walked around the building [*sic*] of the dormitory building, kind of stood beside a wall . . . until all the commotion had left the area. What I was hoping is that it would -- went another direction, but it was actually coming toward me. [¶] Q. All right. [¶] Then what happened? [¶] A. I stood behind a bush and watched as the same college students I had observed when I hopped over the fence [pointed] . . . me out to about three or four police officers."

Regarding the tape-recorded conversation Porter had with Halliburton in the patrol car, the part "about going the other way and how did they catch you" was Porter asking how Halliburton got caught because Porter thought Halliburton must be the person he had seen climbing over the baseball field fence. Porter said, "I just met you up in there[,]" because he and Halliburton had just met and he wanted to inform Halliburton of this fact. Porter denied he and Halliburton were concocting a story to tell the police. Porter could not explain the part of the tape recording where one of them said, "I was almost there, them apartments, I lost my wind, Blood[,]" and the other one replied, "Me too[.]"

Porter testified he did not drop the Ford Explorer keys in the bushes. Those keys remained in his pocket and he surrendered them at the police station. Porter denied he had been wearing a jacket. The sweat pants found in the bushes did not belong to him. The red shoes and the red jacket found in the Explorer did not belong to him. Porter recognized red as the color associated with the Bloods, but testified he had not been in a gang since 1994.

CONTENTIONS

1. Defense counsel was ineffective for not making a motion to suppress evidence.

2. The trial court erred by denying a motion to bifurcate a gang enhancement allegation.

3. There was insufficient evidence to support the conviction for possessing an illegal firearm.

4. The trial court erred by instructing the jury with CALJIC No. 17.41.1.

5. The trial court erred by imposing multiple punishment in violation of section 654.

DISCUSSION

1. *Defense counsel was not ineffective for failing to bring a futile suppression motion*.

In his direct appeal, and in his accompanying habeas corpus petition, Porter contends his trial attorney rendered ineffective assistance of counsel by not moving to suppress evidence found during a warrantless search of the Ford Explorer. This claim is meritless.

As noted above, the police found a set of car keys in the bushes where Porter was trying to hide. The day after the robbery, Detective Hunt set out to see if he could find the vehicle matching these keys. He did this by driving around the area of the Acapulco Restaurant while pushing the panic button on the car key's remote, trying to activate a car alarm. The remote activated the alarm in a Ford Explorer parked in the garage of an apartment complex that was adjacent to the Acapulco Restaurant. Inside the Explorer, Hunt found a pair of red Nike shoes, a cap with the letter "A" on it, a police scanner and a couple of jackets, one of them red in color. At trial, the gang expert opined the extra coats and the police scanner showed the robbery had been well-planned, and that the red coat and shoes were associated with the PDL gang.

"A defendant seeking relief on the basis of ineffective assistance of counsel must show both that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates, and that it is reasonably probable a

more favorable determination would have resulted in the absence of counsel's failings. [Citations.]" (*People v. Price* (1991) 1 Cal.4th 324, 386.) However, trial "[c]ounsel does not render ineffective assistance by failing to make motions or objections that counsel reasonably determines would be futile." (*Id.* at p. 387.) When a defendant claims ineffective assistance based on counsel's failure to bring a motion to suppress evidence on Fourth Amendment grounds, the defendant is required to show the motion had merit. (*People v. Frye* (1998) 18 Cal.4th 894, 989.)

Initially, the Attorney General argues Porter lacked standing to contest the search of the Explorer because the vehicle did not belong to him. Not so. "Where the defendant offers sufficient evidence indicating that he has permission of the owner to use the vehicle, the defendant plainly has a reasonable expectation of privacy in the vehicle and standing to challenge the search of the vehicle. [Citations.]" (*U.S. v. Rubio-Rivera* (10th Cir.1990) 917 F.2d 1271, 1275; see *U.S. v. Baker* (3d. Cir. 2000) 221 F.3d 438, 442-443 [individual who borrowed car and had "substantial control over it" has legitimate expectation of privacy].) Porter could have established he had permission to use the Ford Explorer. He testified at trial he borrowed the Explorer from its owner, who was a girlfriend of his. The Attorney General argues any such permission was vitiated because Porter didn't tell her that he was taking the vehicle to visit his other girlfriend.[3] But the Attorney General has failed to convince us this makes any difference.[4]

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[3] "Q. Did you tell your other girlfriend that you were going to be taking her truck to someone else's house? [¶] A. *I told her I was going to be taking her truck, but I didn't tell her where I was going to be taking her truck to*." (Italics added.) "Q. You lie to them, don't you, sir? [¶] A. Yes, sir, I do. Not going to tell them -- one girlfriend I'm going to my other girlfriend's house."

[4] Although the Attorney General cites *United States ex rel. Laws v. Yeager* (3d Cir.1971) 448 F.2d 74, the same court subsequently stated: "[W]e have previously suggested that a defendant who had stolen a car and used it in a robbery would not have standing to object to a search of the car. See *United States v. Yeager* . . . (rejecting challenge to search on basis that 'if [the defendant's] theories were valid, a stolen car used in a robbery could not be searched and objects therein seized by the police without a search warrant'). We have never considered, however, whether an individual who borrows a car and has control over it has a legitimate expectation of privacy in it. [¶]

The Attorney General argues a suppression motion would have been properly denied because the evidence was recovered during a valid inventory search. Porter argues the search could not have been a valid inventory search because Hunt testified he searched the Explorer *before* he impounded it. Porter points out Hunt testified, "Once I realized that that was the vehicle, we went ahead and searched it, made sure there were no other occupants in the vehicle. And the vehicle was impounded because we found that the keys were a match for the vehicle." But Hunt also testified: "I had the vehicle towed back to the police station, had it followed back to the station. And later that afternoon -- I believe that afternoon I searched the vehicle." However, we need not resolve this issue because we conclude the search came within another exception to the warrant requirement.

Because of an automobile's inherent mobility, it may be searched without a warrant if there is probable cause to believe it contains contraband or evidence of a crime. As this court explained in *People v. Superior Court (Overland)* (1988) 203 Cal.App.3d 1114, 1118-1119: "The automobile exception has its genesis in *Carroll v. United States* (1925) 267 U.S. 132 . . . , which established that 'a search [of a motor vehicle] is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained. [Fn. omitted.]' [Citation.] . . . [¶] Application of this exception is not contingent upon whether the particular automobile could actually be moved at the time of the search. Rather, the inherent mobility of any moving vehicle 'creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible.' (*South Dakota v. Opperman* (1976) 428 U.S. 364, 367 . . .)"

Contrary to Porter's assertion, this automobile exception to the Fourth Amendment's warrant requirement "has no separate exigency requirement." (*Maryland v. Dyson* (1999) 527 U.S. 465, 466-467.) " 'If a car is readily mobile and probable cause

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Cases from other circuits suggest that whether the driver of a car has the reasonable expectation of privacy necessary to show Fourth Amendment standing is a fact-bound question dependent on the strength of his interest in the car and the nature of his control over it; ownership is not necessary." (*U.S. v. Baker*, *supra*,221 F.3d at p. 442.)

exists to believe it contains contraband, the Fourth Amendment . . . permits police to search the vehicle without more.' " (*Id.* at p. 467; see also *U.S. v. Nixon* (11th Cir. 1990) 918 F.2d 895, 903 ["the requirement of exigent circumstances is satisfied by the 'ready mobility' *inherent* in all automobiles that reasonably appear to be capable of functioning"].)

Porter argues there was no probable cause to search the Explorer because, at most, the police only had a hunch it was meant to be used as the getaway vehicle. He argues "the officers had no probable cause to believe the vehicle contained contraband. They did not know if there was anything to be found inside the vehicle."

Certainly the officers did not know for sure if there was robbery evidence in the Explorer, but that is not the test. The test of probable cause to search a vehicle without a warrant is the same as the test applied to a court issuing a search warrant. (See *United States v. Ross* (1982) 456 U.S.798, 825 ["We hold that the scope of the warrantless search authorized by [*Carroll*] is no broader and no narrower than a magistrate could legitimately authorize by warrant."].) Probable cause is shown when, taking all the circumstances into consideration, "there is a fair probability that contraband or evidence of a crime will be found." (*Illinois v. Gates* (1983) 462 U.S. 213, 238 ["The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place."].) "Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as fact finders are permitted to do the same -- and so are law enforcement officers." (*Id*. at pp. 231-232.)

The keys to the Explorer were found lying in the bushes beside a robbery suspect who had just been chased on foot by the police. The Explorer was discovered close to the scene of the robbery. It was reasonable to suspect the Explorer might well have been the robbers' intended getaway car. When Hunt was asked why he tried to find the vehicle corresponding to the keys, he testified: "Well, because the two subjects that were

apprehended in this case were apprehended without a vehicle and it's common that vehicles are used as getaway vehicles. I wanted to try to locate more evidence that might be associated with that case." This was more than a mere hunch; it was probable cause.

Porter's ineffective assistance of counsel claim fails because a motion to suppress the evidence seized from the Ford Explorer would have been denied.

2. *Refusal to bifurcate gang enhancement allegation was harmless error.*

Porter contends the trial court erred when it denied his motion to bifurcate a gang enhancement allegation. We conclude any error was harmless.

The amended information alleged the crimes directly connected to the Acapulco Restaurant robbery had been committed for the benefit of a criminal street gang.[5] Before trial, Porter moved to bifurcate the section 186.22, subdivision (b)(1), gang enhancement allegation on Evidence Code section 352 grounds, arguing its probative value was outweighed by its prejudicial effect, but the trial court refused to bifurcate. We conclude the trial court probably erred by denying bifurcation, but that any error was harmless.

Under a trial court's inherent authority to control the order of proceedings, it generally has discretion to bifurcate an enhancement allegation from the substantive charges. (*People v. Calderon* (1994) 9 Cal.4th 69, 74-75.) As we recently explained in *People v. Hernandez* (June 25, 2003, B150342) __Cal.App.4th __ (03 DJDAR 6861), the most important factor to be considered in determining bifurcation of a criminal street gang allegation is whether the gang enhancement evidence would be cross-admissible at a separate trial on the underlying offenses.

In this case, some of the gang evidence was probative of Porter's identity and motive. Contrary to Porter's suggestion, gang evidence is not restricted to issues of gang rivalry and retaliation. "[I]n a gang-related case, gang evidence is admissible if relevant

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[5] Under section 186.22, subdivision (b)(1), a person may be punished for an additional term of years where he or she is convicted of a felony that is "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ."

to motive or identity, so long as its probative value is not outweighed by its prejudicial effect." (*People v. Williams* (1997) 16 Cal.4th 153, 193.)

The crucial issue in this case was identification. Porter denied involvement in the robbery and claimed he only discovered Halliburton's role when they spoke in the patrol car. Officer Orent testified about the PDL gang, Porter and Halliburton's membership in PDL, and how armed robberies raise the prestige of gang members. Orent explained how the red jacket and shoes taken from the Ford Explorer were associated with Porter's gang membership, and how Halliburton and Porter's references to each other as "Blood" on the tape recording were a common greeting between gang members. Evidence of common gang membership may be relevant to establishing a defendant's identity as the perpetrator of a crime. (See *People v. Champion* (1995) 9 Cal.4th 879, 922 ["evidence that defendants were members of the same gang as other persons involved in the commission of the crimes in this case fortified the testimony of the persons who identified defendants as participants in the murders"].)

However, because of its inflammatory nature, even where evidence of gang membership is relevant, "trial courts should carefully scrutinize such evidence before admitting it." (*People v. Champion*, *supra*, 9 Cal.4th at p. 922.) Here, the gang evidence was fairly inflammatory. Although Porter was not alleged to have personally committed any of the predicate gang offenses described by Orent, those predicate offenses were far more serious than the charged crimes because Orent testified about murders and attempted murders, as well as armed robberies. Orent testified PDL was well-known for committing many robberies, and that PDL members had been involved in 45 murders during the last nine years. Given there was so little need for gang evidence to prove either motive or identity in this case, it appears the prejudicial effect of the gang evidence would have tended to outweigh its probative value, even though the jury ultimately found the gang enhancement to be not true.

But for the same reason, any error in denying the motion to bifurcate was harmless. Regarding motive, this was not a drive-by shooting where the gang evidence illuminates an otherwise inexplicable act; robbery has its own intrinsic motive. As for

identity, the eyewitness evidence was overwhelming. The prosecution established a clear chain of eyewitness identification demonstrating Porter was one of the two men who robbed Romero. Officer Ventura testified he never lost eye contact as he watched one of the robbers leave the Acapulco Restaurant, run across the street to the university campus, climb over a fence into the baseball field, and then climb over a second fence and fall in front of the passing students.

Porter does not deny he was the person who fell in front of the students and was subsequently discovered hiding in the bushes near a dormitory building. Rather, Porter's defense was that, while trying to find a pay phone, he innocently crossed paths with the actual robber, who happened to climb over the same baseball field fence right after Porter did. But this story was hardly credible. Ventura's eyewitness testimony was corroborated by Romero's identification of Porter, by the students' observations of a jacket-clad Porter leaping out of the ball field, falling at their feet and then hiding in the bushes, as well as by all the robbery-related evidence found in Porter's immediate proximity. Porter testified he thought Halliburton was the robbery suspect who climbed the fence into the baseball field, but the evidence makes it clear Halliburton had not even run in that direction before he was apprehended. Porter rather unbelievably contradicted the students' testimony about his consciousness of guilt statement ("Don't tell them where I am"), and asserted he could not see the pay phone in one of the People's photographic exhibits.[6]

Hence, even if the trial court abused its discretion by denying the motion to bifurcate, the error was harmless because there was overwhelming evidence of guilt. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.)

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[6] Shown a photograph of the liquor store where he claimed to have purchased a cigar that night, Porter denied the photograph showed there was a pay phone outside. The existence of this pay phone seriously undercut Porter's testimony he had wandered onto the university campus only because he was searching for a pay phone. Defense counsel appears to have conceded during closing argument that the photograph did indeed show a pay phone.

3. *Sufficient evidence of possessing firearm with identification number removed*.

Porter contends there was insufficient evidence to support his conviction for possessing a firearm with its identification number removed. (§ 12094).[7] He argues the People failed to prove the gun found at the restaurant the day after the robbery was the gun he used. This claim is meritless.

Porter does not deny the gun found at the restaurant was missing an identification number in violation of section 12094. Rather, he contends there was insufficient evidence this gun was the one he used during the robbery. He argues, "[Romero] could not identify the gun as the one used by either robber in the offense. [The gun was found] near a dumpster behind the Acapulco restaurant a day after the robbery. Romero testified both men were handling guns during the robbery. There was no evidence connecting appellant to this gun . . . At best, [Romero] testified Exhibit 3 [the gun with the missing identification number] appeared to be similar to the gun used in the robbery." We are not persuaded by this argument.

First, Porter's assertion Romero testified that *both* robbers had guns is fallacious. This assertion is based on a very brief portion of Romero's testimony describing how the first robber came into the restaurant and put a gun to his head: "I went back against the wall, and he [the gunman] told me to move a little bit, and a second person came in right behind him, and *he* was pointing the gun and telling me to be quiet and asking how many people were in the restaurant, who I was, what did I do . . . ." (Italics added.) Although the italicized "he" might be read as referring to the second robber, when the entirety of Romero's testimony is considered it is clear Romero was referring to the first robber. Indisputably, Romero testified one of the robbers was armed with a gun and the other one was armed with a knife. Romero never said he saw two guns.

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[7] Section 12094, subdivision (a), provides: "Any person with knowledge of any change, alteration, removal, or obliteration described herein, who buys, receives, disposes of, sells, offers for sale, or has in his or her possession any pistol, revolver, or other firearm which has had the name of the maker, model, or the manufacturer's number or other mark of identification including any distinguishing number or mark assigned by the Department of Justice changed, altered, removed, or obliterated is guilty of a misdemeanor."

Second, Romero's identification of the gun was fairly strong. "Q. By [the prosecutor]: Showing you People's 3, sir, does that look familiar to you? [¶] A. Yes. [¶] Q. Is it the same color or a different color than the gun that was pulled on you? [¶] A. *Looks like the same one*. [¶] Q. Doe sit [*sic*] appear to be approximately the correct size? [¶] A. Well, yes. [¶] Q. I am not asking if it is the same gun, just does it appear to be similar. Does it? [¶] A. Yes." (Italics added.)

"It is a familiar rule that '[I]n order to sustain a conviction the identification of the defendant need not be positive. [Citations.] Testimony that a defendant "resembles" the robber [citation] or "looks like the same man" [citation] has been held sufficient. The testimony of one witness is sufficient to support a verdict if such testimony is not inherently incredible. [Citation.] The sufficiency of the evidence of identification is generally a question for the trier of the facts. [Citation.]' [Citation.]" (*People v. Barranday* (1971) 20 Cal.App.3d 16, 22.)

Third, contrary to Porter's assertion the gun was found near a dumpster *behind* the Acapulco Restaurant, it was apparently found on the floor *inside* the restaurant. "Q. What were you doing when you found the weapon? [¶] A. Cleaning up and taking out the trash. [¶] Q. And where did you find it? [¶] A. Like, this -- under, like, a shelf where we put the plates." "Q. And would it . . . be on the shelf or underneath on the floor? [¶] A. Under. I . . . was sweeping."

Hence, Romero identified the gun as looking like the one Porter used, the gun was apparently found inside the restaurant (as was the knife used by Halliburton), and Romero clearly testified there had been only one gun involved in the robbery. The jury could fairly infer from this evidence that the gun found by the restaurant worker the day after the robbery was the same gun Porter had used.

4. *Anti-nullification instruction.*

Porter contends the trial court erred by giving an anti-nullification instruction (CALJIC 17.41.1) to the jury. This claim is meritless.

In *People v. Engelman* (2002) 28 Cal.4th 436, 449, our Supreme Court concluded this jury instruction was not erroneous: "As we have explained, the Court of Appeal

rejected defendant's claim that the giving of CALJIC No. 17.41.1 constituted error, and we agree. Nonetheless, . . . we believe that CALJIC No. 17.41.1 creates a risk to the proper functioning of jury deliberations and that it is unnecessary and inadvisable to incur this risk. Accordingly, in the exercise of our supervisory power [citations], we direct that CALJIC No. 17.41.1 not be given in trials conducted in the future." Trial in this case predated *Engelman*.

5. *Multiple punishment*.

Porter contends the trial court improperly imposed multiple punishment in violation of section 654. This claim is meritless.

" 'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective* of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' [Citation.]" (*People* v. *Latimer* (1993) 5 Cal.4th 1203, 1208.) "The question of whether the acts of which [a defendant] has been convicted constitute an indivisible course of conduct is primarily a factual determination, made by the trial court on the basis of its findings concerning the defendant's intent and objective in committing the acts. This determination will not be reversed on appeal unless unsupported by the evidence presented at trial." (*People* v. *Nichols* (1994) 29 Cal.App.4th 1651, 1657; see also *People* v. *McCoy* (1992) 9 Cal.App.4th 1578, 1585 [trial court's § 654 finding, whether explicit or implicit, may not be reversed if there is substantial supporting evidence].) "Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them." (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.)

Porter contends the trial court erroneously sentenced him for both robbery and false imprisonment because "the act of confining [Romero] inside a refrigerator was a continuation of the single act of committing robbery." But when a defendant commits a crime in order to prevent detection of an earlier crime, the second crime is committed

with a separate intent. (See *People v. Coleman* (1989) 48 Cal.3d 112, 162 [where defendant robbed victim, then killed bystander-witness, then stabbed robbery victim, it was proper to conclude "defendant committed the assault with the intent and objective of preventing the victim from sounding the alarm about the murder, and that this intent and this objective were separate from, not incidental to, the robbery"].) Romero had already given Porter his money before Porter put him in the refrigerator. Hence, it was reasonable to conclude the false imprisonment had been committed to facilitate Porter's escape and, therefore, multiple punishment was proper. (See *People v. Foster* (1988) 201 Cal.App.3d 20, 27-28 [false imprisonment was not merely incidental to robbery where, after store employee "had turned over all the money, the robbers forced her and two other victims . . . into the store cooler and blocked their exit by pushing a hand cart against the door"].)

Equally without merit is Porter's contention the trial court erred by sentencing him for both armed robbery and being a felon in possession of a firearm. " 'Whether a violation of section 12021, forbidding persons convicted of felonies from possessing firearms concealable upon the person, constitutes a divisible transaction from the offense in which he employs the weapon depends upon the facts and evidence of each individual case. Thus where the evidence shows a possession distinctly antecedent and separate from the primary offense, punishment on both crimes has been approved. On the other hand, where the evidence shows a possession only in conjunction with the primary offense, then punishment for the illegal possession of the firearm has been held to be improper where it is the lesser offense.' [Citation.]" (*People v. Bradford* (1976) 17 Cal.3d 8, 22.) "[I]f the evidence demonstrates at most that fortuitous circumstances put the firearm in the defendant's hand only at the instant of committing another offense, section 654 will bar a separate punishment for the possession of the weapon by an ex-felon." (*People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1412.)

Porter argues "there was no evidence he had possession of the gun prior to the robbery. Possibly Halliburton handed appellant the gun just as they walked inside the restaurant. There is no telling based on this record." However, although there was no

direct evidence Porter had possession of the gun before going into the restaurant, the circumstantial evidence fairly established that fact. Porter, disguised in a mask and wearing gloves, entered the restaurant, grabbed Romero, pulled out the gun, and tried to use Romero to gain access to the manager's office, presumably because he and Halliburton planned on stealing the restaurant's receipts. The premeditated nature of the robbery, and the lack of any evidence that Porter spontaneously obtained the gun at the restaurant, establishes he had the gun before he committed the robbery.

Porter's suggestion Halliburton might have handed him the gun just as he entered the restaurant is not only pure speculation, but it would not make any difference because that would not constitute a merely fortuitous coming-into-possession. As we explained in *Jones*: "It is clear that multiple punishment is improper where the evidence 'demonstrates at most that fortuitous circumstances put the firearm in the defendant's hand only at the instant of committing another offense . . . .' [Citation.] For example, in [*Bradford*], the defendant was stopped by a highway patrol officer for speeding. He wrested away the officer's revolver and shot at the officer with it. [Citation.] The California Supreme Court found punishment for both assault with a deadly weapon upon a peace officer and possession of a firearm by an ex-felon was prohibited by section 654. The defendant's possession of the officer's revolver was not antecedent and separate from the use of the revolver in assaulting the officer. [Citation.]" (*People v. Jones*, *supra*, 103 Cal.App.4th at 1144.) "Based upon these principles, we conclude that section 654 is inapplicable when the evidence shows that the defendant arrived at the scene of his or her primary crime already in possession of the firearm." (*Id.* at p. 1145.)

There was nothing fortuitous about Porter's possession of the gun just before he confronted Romero. Even if Halliburton handed Porter the gun after they had already come in the back door of the restaurant, we would find Porter had constructive possession because, inferentially, this merely would have been the perpetrators' plan of attack. Thus, the record supports the trial court's implied finding Porter's possession of the gun was antecedent to the robbery. Therefore, consecutive punishment on count 4 was not barred by section 654.

However, the Attorney General properly concedes the trial court erred by sentencing Porter on count 5, possession of a firearm by a probationer (§ 12021, subd. (d)). A defendant may not be punished for this crime if he is also "subject to subdivision (a) or (c)" of section 12021.[8] Because Porter was sentenced on count 4 for violating section 12021, subdivision (a), he could not also be sentenced on count 5. Therefore, we will order the judgment modified to stay imposition of the eight-month sentence on count 5.

DISPOSITION

The sentence on count 5 is ordered stayed. The trial court is directed to prepare an amended abstract of judgment reflecting this modification and forward it to the Department of Corrections. As modified, the judgment is affirmed. The habeas corpus petition is denied.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P.J.

We concur:

CROSKEY, J.

ALDRICH, J.

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8 Section 12021, subdivision (d), covers "[a]ny person who, as an express condition of probation, is prohibited or restricted from owning, possessing, controlling, receiving, or purchasing a firearm and who owns, or has in his or her possession or under his or her custody or control, any firearm *but who is not subject to* subdivision (a) or (c)." (Italics added.)